

STATE OF MAINE

DEPARTMENT OF MARINE RESOURCES

IN THE MATTER OF THE APPLICATION OF)	
PAUL BRAYTON, DBA TIGHTROPE SEA FARMS,)	FINDINGS OF FACT,
FOR AN AQUACULTURE LEASE LOCATED IN)	CONCLUSIONS OF LAW
THE BLUE HILL SALT POND, BLUE HILL,)	AND DECISION
HANCOCK COUNTY, MAINE)	

On March 23, 1998, Paul Brayton, d/b/a Tightrope Sea Farms, of Brooklin, Maine applied for an aquaculture lease totaling 19 acres, in three separate tracts, of coastal waters of the State of Maine in the Blue Hill Salt Pond, Blue Hill, Hancock County, Maine. The applicant requested the lease for a term of ten years for the purpose of cultivating blue mussels, Mytilus edulis, American oysters, Crassostrea virginica, European oysters, Ostrea edulis, scallops, Placopecten magellanicus, and surf clams, Spisula solidissima, using suspended culture techniques.

Approval of aquaculture leases is governed by 12 M.R.S.A. §6072. This statute provides that the Commissioner of the Department of Marine Resources (DMR) may grant a lease if he determines that the project will not unreasonably interfere with the ingress and egress of riparian owners, navigation, fishing or other uses of the area; the ability of the site and surrounding areas to support ecologically significant flora and fauna; or the use or enjoyment within 1,000 feet of municipally, state or federally owned beaches, parks, or docking facilities. The Commissioner must also determine that the applicant has demonstrated that there is an available source of organisms to be cultured for the lease site.

A public hearing on this application was held on September 29, 1998 at 7:00 p.m., in Blue Hill.

**Evidence Introduced Concerning the Nature
and Impact of the Proposed Lease**

The applicant provided testimony on the lease application. He testified that he had extensive experience in commercial fisheries, the wholesale seafood trade and shellfish aquaculture. He stated that he was interested in shellfish aquaculture as a form of protein production that, in his opinion, would not be ecologically destructive.

The applicant testified that the proposed lease area would include three separate tracts or sites. Site A would be the spat collecting site, 4.5 acres (300' x 600') located in the southernmost section of the salt pond. Site B would be the grow-out location of 13.5 acres, (300' x 1800') in the middle salt pond with the southern end of that tract located off the applicant's property. Site C would be a one acre (200 ft²) area used for experimentation for deep water shellfish growout. He testified that the primary use would be spat collection and rearing of blue mussels. The other shellfish listed were included for future experimentation. The source of seed would come either from the wild brood stock in the salt pond or from certified Maine hatcheries. He testified that he would use only species that come from certified disease free stock.

The applicant testified the Site A spat collecting materials would be used according to the conditions required by the Inland Fisheries and Wildlife (IF&W) Essential Habitat requirements to operate inside the designated eagle nest boundary (BE 022A). The spat collectors consist of up to twelve 300 foot longlines with 6 foot lengths of rope, for collecting spat, suspended along the longline. After the spat/seed has been harvested from the collection lines, it would be placed in tubes suspended in the top 3 meters of water in the grow out area, Site B. The sections of surface lines for growout would be arranged in maximum lengths of 250 feet and moored with 40 foot lengths of railroad tracks, ½ inch chain and 500 pound steel wheels. The surface lines would be spaced 20 feet apart. The operation for spat collecting, growout and harvest would generally occur approximately 10 months of the year or when there is no ice prohibiting the work.

The applicant would access the sites from his own property, using 20 foot work skiffs powered by one cylinder outboard motors with muffled exhausts. He stated that these engines were quiet enough to have a normal conversation while running. He stated that all activities would occur only during the day time and therefore he did not need any lighting. The applicant stated that the maximum height of the buoys used to hold the longlines would be 13.5 inches. One 20 x 30 foot work float and one diesel powered hydraulic unit would be used as support structures.

The applicant testified that the proposed lease would not interfere with riparian shore access. He owns property from which he would access the proposed lease sites. In his opinion, there was at

least 200 to 300 feet between the shore to the proposed lease site boundaries. He stated that small boats common to the area included kayaks, canoes and small boats used by urchin harvesters, duck hunters, and other fishermen. He felt that they would be reasonably able to navigate within the 20 foot open sections between the longlines. Boat traffic in the salt pond is limited due to the low bridge at the north end that restricts access.

The applicant stated that the site is entirely subtidal and would, therefore, not interfere with intertidal harvesting in the area. The proposed lease and activities would not interfere with the elver fishery in Carelton Stream, draggers or rakers for oyster harvesting, clamming, or one known local lobster fisherman.

The site was selected for its plankton productivity. He stated that the operation would not exceed the plankton population as indicated by the lack of water clarity due to abundant plankton growth in the salt pond. He felt that there is adequate dissolved oxygen, tidal exchanges and currents to support the entire salt pond. He explained that the only time the salt pond was closed for pollution was due to the change in federal standards and 17 homes found to have errant septic systems. The applicant testified that he does not use bottom paint on his boats. He also stated that he uses only FDA approved non-toxic vegetable oil for the hydraulics. The applicant testified that there are no public owned lands or access within 1,000 feet of the proposed lease.

A marine biologist, employed by the Department, testified about the statutorily required site review that he conducted June 11 and August 4, 1998. The Department report included the following criteria: a scuba diver survey of the local flora and fauna and bottom composition; vertical profiles of the water column which include temperature, salinity, dissolved oxygen and pH, and depths; collection of plankton; current measurements; proximity measurements of the proposed site to shore and to other leases; plus observations and documentation of local fisheries.

The biologist testified that an underwater video was taken on each of the three proposed tracts. Bottom sediments were soft mud and the topography flat. Site A had a maximum depth of 33 feet, Site B a maximum depth of 18 feet, and Site C a maximum depth of 43 feet. No flora was observed in the dives. The most abundant fauna observed were blue mussels; common observations were made of

green crabs, mud shrimp, sea scallops, and the common star fish. An occasional rock crab and hermit crab were also observed. No European oysters were observed throughout any of the dives. The distances to shore were measured between 527 to 692 feet from the tracts boundaries to the high water mark on shore. One fisherman, dragging for European oysters, was observed and interviewed on June 11, 1998. The local harbormaster informed the biologist that no moorings exist within the proposed lease tracts and that navigation is limited and the small boat traffic that occurs there would not be impacted as long as the tracts were marked in accordance with Department regulations. A copy of the Department site review report was entered. Exhibit 2. A copy of the correspondence confirming the IF&W's approval of the applicant's Essential Habitat Evaluation permit letter dated September 2, 1998 for BE 022A for Site A was entered. Exhibit 3.

Several local residents and riparian landowners testified about concerns for their property value, local zoning issues, aesthetics and any future applications or expansion of aquaculture in the salt pond. A riparian testified that, in his opinion, the lease should not be granted because it would not generate as much revenue as he pays in personal property taxes. Another riparian couple, opposed to the lease, testified that they did not want to view the operation from their property. They complained that they did not receive the riparian public notice due to an outdated address provided by the town and, with the applicant's agreement, were provided a 10 day period in which to submit written comments to be included in the administrative record of the hearing. The riparian couple also requested that, if the lease was granted, that a derelict boat located on their shorefront property, believed to have belonged to a previous aquaculture lease holder, be removed by the applicant.

A fisherman, also a former Department employee, testified that the shellfish other than mussels requested to be raised should only be obtained from broodstock originating from the salt pond. He stated that there have been disease concerns documented in the Damariscotta River where the applicant listed the location of a potential hatchery source for shellfish seed stock. The fisherman was asked if he harvested any shellfish from the salt pond and he answered that he did not.

A local resident, who testified that he dragged European oysters from the salt pond, to supplement his income, expressed similar concerns regarding the introduction of disease. He indicated

that the rearing of shellfish obtained from places other than the salt pond would bring disease and catastrophe to the existing populations, particularly of the European oysters that he harvests. He stated that mussels were acceptable to raise, however he opposed the additional species. He also testified that, in his opinion, the applicant's activities even if permitted by the Army Corps of Engineers (ACOE) were illegal.

A former lease holder of a 15 acre site located in the salt pond, testified in support of the applicant. He stated that the applicant was well qualified, in his opinion, to pursue such an operation. He testified that during the time he held a lease, 1974 through 1976, he introduced 3 million European oysters from California that he attempted to raise in trays. He testified that the existing European oyster population originated from his former lease activities and was not an indigenous species.

A member of the general public with experience in commercial fishing and seafood businesses testified in support of the lease. He testified that he personally observed little recreational use of the salt pond. He stated that he felt there was a need to balance the coexistence of entrepreneurial fishing industries with the wealthier segment of the local community residents. He questioned if it was right to protect an introduced species such as the European oysters. He also testified that natural storm events have a far greater impact on the ecology of areas such as the salt pond than the proposed activities would for the next 10 years.

Findings of Fact

According to the Department biologist's report, the proposed lease, composed of three separate tracts, range in distances approximately 527 to 692 feet from the high water mark on the eastern shore of the salt pond. Testimony and evidence provided by the applicant indicated that the proposed activities are entirely subtidal. He is not requesting to use the shore or intertidal area other than land owned by the applicant to access the proposed lease. According to the harbormaster, no moorings are issued within the proposed lease boundaries. Based on the testimony and evidence, and the stated willingness of the applicant to remove gear abandoned by a previous lease holder, including a derelict work boat on

the shore of the Kirkpatrick property, I find that the lease will not unreasonably interfere with the ingress and egress of the riparian owners.

Testimony and evidence by the applicant and the Department biologist indicate that the proposed lease tracts are located in an area that has limited small boat traffic due in part to restricted access to the salt pond. There is occasional recreational boat traffic that includes kayaking, canoeing, and seasonal duck hunting. Other small boat use would include the traffic of clam harvesters going to the mud flats at the southern end of the salt pond, urchin harvesting, oyster dragging or raking, and one lobster fisherman. The applicant testified that the grow out gear would be arranged with 20 feet of clearance between each suspended longline for reasonable navigation and clearance. Based on the testimony and evidence, I find that the proposed lease activities will not unreasonably interfere with navigation in the area.

Testimony by the applicant and the Department's biologist indicated that commercial and recreational fishing activity in the area of the proposed lease is limited. There are soft shell clam resources in the intertidal areas of the salt pond. There is a seasonal elver fishery in Carelton Stream. According to the applicant, there are European oysters harvested from the salt pond, however according to diver surveys by the Department's biologist, none were observed within the proposed lease sites. The nearest existing aquaculture lease is located over 6.8 miles in Blue Hill Bay, in the town of Tremont. Based on the evidence and testimony, I find that the proposed lease will not unreasonably interfere with fishing, aquaculture leases, or other uses of the area.

The Department biologist's observations of a plankton population agreed with the applicant's testimony that the area has adequate plankton resource to support the proposed activities. The applicant provided information on the use of non-toxic materials to prevent any potential occurrence of pollution from his activities. The applicant and Department's biologist provided the development letters and approval from IF&W regarding that agency's conditions on the aquaculture spat collection activities at Site A. IF&W has regulatory authority for permitted activities that occur within any designated ¼ mile boundary referred to as an Essential Habitat for Endangered and Threatened Species. The boundary that Site A falls within is designated bald eagle nest BE 022A. Based on the evidence and testimony in

the record, I find that the proposed lease will not unreasonably interfere with the ability of the site and surrounding areas to support existing ecologically significant flora and fauna.

The applicant testified that he would obtain the mussel spat/seed from the proposed lease. The applicant testified that he would obtain all other shellfish seed from either the proposed lease sites or from certified Maine hatcheries. He testified that he would not introduce any shellfish unless it was certified as disease free. There was concern expressed that if the shellfish hatchery located on the Damariscotta River, listed as a potential source to obtain seed shellfish, was used for the seed resource, that those shellfish would introduce diseases to the European oysters in the salt pond. The applicant, as well as all shellfish hatcheries, are required by statute and regulation to comply with all applicable shellfish disease testing introduction and transfer requirements.

Based on the testimony and evidence in the record, I find that there is an available source of blue mussels, American oysters, European oysters, scallops and surf clams.

Based on the maps and charts provided by the applicant, the testimony of the applicant, and Department's site review report, I find that the proposed lease activities will not unreasonably interfere with the public use or enjoyment and that the site is not located within 1,000 feet of any municipally, state or federally owned beaches, parks, or docking facilities.

Conclusions of Law

Based on the above findings, I conclude that:

1. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner;
2. The aquaculture activities proposed for this site will not unreasonably interfere with navigation;
3. The aquaculture lease activities proposed for this site will not unreasonably interfere with fishing or other uses of the area, taking into consideration the number and density of aquaculture leases in the area;
4. The aquaculture lease activities proposed for this site will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna;
5. The applicant has demonstrated that there is an available source of blue mussels,

Mytilus edulis, American oysters, Crassostrea virginica, European oysters, Ostrea edulis, scallops, Placopecten magellanicus, and surf clams, Spisula solidissima to be cultured for the lease site; and

6. The aquaculture lease activities proposed for this site will not unreasonably interfere with public use or enjoyment within 1,000 feet of municipally, state or federally owned beaches, parks, or docking facilities.

The evidence in the record supports a finding that the proposed aquaculture activities meet the requirements for the granting of an aquaculture lease set forth in 12 M.R.S.A. §6072 (7-A).

Decision

Based on the foregoing, the Commissioner grants the requested lease of 19.0 acres to the applicant for a period of ten years, from the date of this decision, for the purposes of cultivating blue mussels, Mytilus edulis, American oysters, Crassostrea virginica, European oysters, Ostrea edulis, scallops, Placopecten magellanicus, and surf clams, Spisula solidissima, using suspended culture techniques as described in the application and the hearing record. The applicant shall pay the State of Maine rent in the amount of \$50.00 per acre per year. The applicant shall post a bond or establish an escrow account in the amount of \$5,000.00, conditioned upon its performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

Conditions to be Imposed on Lease

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities. Conditions are designed to encourage the greatest multiple, compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the aquaculture law.

The following conditions are placed on this lease:

1. recreational boating and recreational fishing, otherwise permitted by law, is to be allowed in the open areas of the lease;
2. the lease area shall be marked in accordance with U.S. Coast Guard and Department of Marine Resources requirements; and
3. abandoned gear described in the record shall be removed within two years of the granting of the lease; and

4. conditions specified by IF&W for the lease area within BE 022A shall be met.

The Commissioner may commence revocation procedures if he determines that substantial aquaculture has not been conducted within the preceding year, or that the lease activities are substantially injurious to marine organisms. If any of the conditions or requirements imposed in this decision, in the lease, or in the law are not being observed, the Commissioner may revoke the aquaculture lease.

Dated:

George D. Lapointe (Commissioner)
Department of Marine Resources